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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-431

VITA FOOD PRODUCTS OF ILLINOIS, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL FISHERIES INSTITUTE, INC., IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the National Fisheries Institute, Inc.,[1] a trade organization whose membership consists of approximately 580 processors, distributors, brokers and importers of fish and seafood products. The membership represents approximately ninety percent of the fresh and frozen processed fish industry in the United States by pound and dollar amounts. National Fisheries Institute is the only such trade organization for the fish and seafood industry.

[1] This brief is filed with the written consent of all parties hereto pursuant to Supreme Court Rule 42(1).

The issue presented here—whether traces of the chemicals DDT and dieldrin found in processed fish sold in interstate commerce are "food additives" within the meaning of the Federal Food, Drug and Cosmetic Act—is an important question which is likely to have a profound impact not only on the seafood industry but on all food processors in this nation. The conclusion reached by the Court of Appeals that derivatives of DDT and dieldrin contained in fish in their natural state are transformed into a "food additive" by processing when those chemicals are not at any point in time added to, or used in connection with the fish after they are caught, is an extraordinary example of a court enlarging the plain meaning of statutory language in order to reach a desired result. The instant case apart from its disturbing implications for the food industry also has dangerous ramifications in the area of administrative agency regulation. It is for these reasons that the National Fisheries Institute respectfully submits its views.

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law which has not been, but should be, resolved by this Court. While the specific question decided by the Court of Appeals—whether the traces of DDT and dieldrin found in the fish smoked and sold by petitioner in interstate commerce are food additives—has a direct impact on the interests of the National Fisheries Institute and the food industry as a whole, the far reaching ramifications of that decision are even more alarming. Stated in its broadest terms, the Seventh Circuit has held that a substance, in this instance

a chemical residue or pesticide, can become a "food additive" within the meaning of §201(s) of the Federal Food, Drug and Cosmetic Act, 72 Stat. 1784, 21 U.S.C. §321(s), when the raw product containing the substance is processed for use and distribution in interstate commerce, even though the substance was not introduced into the food product by the processor, but rather through environmental activity beyond his control.

The conclusion reached by the Court of Appeals does violence to the statutory scheme established by Congress and the legislative history, which clearly evidence the intent of Congress to distinguish between substances deliberately used in connection with food processing, substances which are incidentally added during food processing, and those substances which accidentally become part of the food.[2]

It cannot be over-emphasized that the issue here is not the potential harm and danger presented by the presence of substances such as DDT and dieldrin. If in fact the presence of DDT or dieldrin, or any other such chemical residue or pesticide in a food product is potentially harmful to the consuming public, the Food, Drug and Cosmetic Act provides ample means for the detection, regulation, control and removal of such products from interstate commerce. 21 U.S.C. §342.

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[2] The legislative history of the Food Additives Amendment is thoroughly discussed in the Petition for Writ of Certiorari filed by Petitioner Vita Food Products of Illinois, Inc. In an effort to avoid unnecessary repetition, the *amicus curiae* respectfully refers the Court to the discussion contained therein.

The Court of Appeals has focused its attention on a purported "gap" in the Food, Drug and Cosmetic Act resulting from its conclusion that the presence of a chemical pesticide for which there are no tolerance levels with respect to a specific "raw" product, causes such product to be "adulterated" as a matter of law without the requirement of any proof of potential danger to the public health; yet when the chemical pesticide is found in the same product after "processing", its presence must be proven harmful or potentially dangerous in order to cause such processed product to be deemed "adulterated."

This purported "gap" can be traced to the erroneous reasoning of the Court of Appeals as applied to the specific facts in the case at bar. The initial error of the lower court is its determination that DDT and dieldrin in the raw chubs are pesticide chemicals.[3] The Court of Appeals compounds this error by its conclusion that the mere presence of a pesticide chemical, for which there is no tolerance level, in a raw product renders that product adulterated as a matter of law.

21 U.S.C. §346a(a) provides in pertinent part as follows:

> "Any poisonous or deleterious pesticide chemical . . . *added* to a raw agricultural commodity, shall be deemed unsafe . . . ." (emphasis added.)

The whole thrust of the case at bar, whether dealing with DDT and dieldrin as a poisonous substance, pesticide chemical or food additive, is the fact that it has not been *added* to the product either in its raw state

[3] See Petition for Writ of Certiorari, p. 30.

or during processing, but was introduced into the raw product by environmental activity beyond the control of the processor. Therefore, the presence of DDT or dieldrin in the raw chubs could not have rendered the raw product adulterated as a matter of law. Not having been *added* to the product, it was incumbent upon the Government to prove that the presence of this substance would render the chubs injurious to health before the chubs could be declared adulterated.

Finally, if inconsistencies exist in the law as it now stands, it is not within the purview of the courts to enlarge by judicial fiat that which should be promulgated by Congress. The Court of Appeals concedes that in the specific case in question neither DDT nor dieldrin were added to the product during the manufacturing process. The Court of Appeals with a wave of its judicial wand has created a fictitious label for the sole purpose of reaching a pre-determined result. By labeling chemical residues or pesticides which are introduced into a raw product by the environment "food additives" solely because the product is subsequently processed, the Court of Appeals has enabled the Government summarily to banish a food product from interstate commerce without showing any deleterious effect or potential danger to the public health arising from the consumption of that food. Such action can and will remove large quantities of good and wholesome food from this nation's food supply. The benefits resulting from allowing the Government to forego its required burden of proving "adulteration" merely to fill a purported "gap" or "inconsistency" in the Act is far outweighed by the economic consequences to be suffered by the industry and the public at large.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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